

Bay Delta Conservation Plan
Governance Working Group

Revised Preliminary ~~Draft~~ Recommendations for Governance Structure

~~This draft implements the Steering Committee's Feb. 4th comments on a prior draft. It also reflects the workgroup's recommended directions on open issues in prior drafts. This draft reflects our recommended directions on such open issues, understanding that each member reserves the right to qualify, or change, such direction as the rest of the plan matures. As a matter of form, we have also sought to (i) better recognize the many statutes applicable to the plan and (ii) break dense concepts into component elements.~~

Permittees

March 25, 2009 Draft for Steering Committee Review

The Governance Workgroup revised the Feb. 26 draft in response to the Steering Committee's Feb. 27 comments. In particular, we have clarified: (i) the terminology of regulatory authorization and authorized entity (replacing "permit" and "permittee"), (ii) the relative functions of implementing and supporting entities, (iii) the difference between routine and non-routine changes, (iv) the use of science in all such changes, (v) and the boundary between such changes (which are within the four corners of the regulatory authorizations) and a plan modification.

Authorized Entities

1. The Bay Delta Conservation Plan will be the basis for ~~permits authorizing permittees~~regulatory authorizations to take listed species of fish and wildlife, and cause other environmental impacts, incident to Delta water operations and related covered activities. The ~~permittees are those authorized~~ entities ~~who~~ will be legally responsible for compliance with ~~the permits~~their regulatory authorizations, including the conditions requiring implementation.
 - 1.1. A primary purpose and use of the plan will be compliance with the federal Endangered Species Act (ESA), California Endangered Species Act (CESA), and the California Natural Community Conservation Planning Act (NCCPA). ~~A permittee~~ Incidental take authorizations will ~~be issued to:~~ (i) ~~each~~ non-federal entity authorized under ESA section 10(a)(1)(B), NCCPA section 2835, and CESA section 2081, or (ii) ~~the each~~ federal entity authorized under ESA section 7(a)(2), to take endangered or threatened fish

and wildlife species incident to water operations and other covered activities, subject to the plan conditions:⁺

- 1.2. ~~A permittee will also be the entity authorized to cause other environmental impacts incident to~~The entities receiving incidental take authorizations for covered activities; ~~(“authorized entities”)~~ will also obtain authorizations under other applicable ~~environmental~~regulatory statutes. These include but are not limited to: California Water Code sections 1000 *et seq.* (water rights), Water Code sections 13000 *et seq.* (water quality), California Fish and Game Code sections 1600 and 5900 *et seq.* (fish screens, channel modification), and Clean Water Act section 404 (dredge and fill).
 - 1.2.1. A separate ~~permit~~authorization will likely issue under each such statute.
 - 1.2.2. ~~The Governance Workgroup anticipates that the~~The plan will be designed to comply with the statutes listed in point 1.1 and will be consistent with the ~~permitting obligations described~~requirements of the statutes listed in point 1.2.
- 1.3. Each ~~permittee~~authorized entity will have the legal and financial capacities to:
 - 1.3.1. Perform those responsibilities assigned to it by ~~permits~~regulatory authorizations. If responsibilities are jointly assigned to several ~~permittees~~authorized entities, each will have such capacity.
 - 1.3.2. Remedy inadequate (including untimely or ineffective) performance of the plan as ~~permitted~~authorized.
 - 1.3.3. Respond to changed circumstances that affect plan implementation.
 - 1.3.4. Modify the covered activities as may be necessary for continuing compliance with applicable laws.
- 1.4. The ~~permittees~~plan and regulatory authorizations will ~~have specify the~~ distinct responsibilities ~~as specified of each of the authorized entities to implement the conservation strategy described in the plan (Chapter) and permits-~~ 3.

⁺ ~~USBR representatives have stated that “permittee” is not an accurate description of USBR’s status under ESA section 7(a)(2). The Governance WG will find mutually agreeable terminology as we develop Chapter 7.~~

- 1.4.1. The ~~Governance Workgroup expects~~conservation measures that ~~these are identified in the conservation strategy, as described in Chapter 3, will include (i) operational rules for the covered activities to avoid or minimize take of listed species (Chapter 3.4.1), (ii) measures to restore habitat (Chapter 3.4.2, 3.4.4), and (iii) measures to manage other stressors (Chapter 3.4.3).~~
 - 1.4.2. The responsibilities ~~will not be co-equal for each facility or other covered activity of authorized entities to implement the conservation strategy will be set out, as appropriate, in the plan, regulatory authorizations, implementing agreements, and other agreements described in point 6.1.~~
2. California Department of Water Resources (DWR) will be ~~a permittee~~an authorized entity.
 - 2.1. The State of California, through DWR, will construct and own the new conveyance facility.
 - 2.2. Under existing authority, DWR constructed and owns the State Water Project's (SWP) existing Delta facilities, including the Banks Pumping Plant. It will seek and obtain ~~permits~~regulatory authorizations consistent with the plan to continue to operate such facilities ~~in compliance with applicable environmental laws.~~
3. SWP and CVP Contractors ~~will establish~~have established a Joint Powers Authority (Contractor JPA) in order to assist with plan implementation.
 - 3.1. ~~The Subject to continuing discussion between DWR and Contractors and within the Governance Workgroup, the~~ JPA will be a separate ~~permittee~~authorized entity, or ~~otherwise will be~~ a supporting entity (receiving coverage under DWR's ~~permits~~regulatory authorizations) as described in point 9.
 - 3.2. The Contractor JPA's responsibilities will be contained or reflected in the plan, implementing agreement, and ~~permits~~other related agreements.
4. U.S. Bureau of Reclamation (USBR) will receive incidental take and other applicable regulatory authorizations under the statutes described in points 1.1 – 1.2.
 - 4.1. USBR is expected to ~~enter into an agreement with DWR to obtain capacity and other rights in the operation of~~ provide for wheeling of Central Valley Project (CVP) water through the new conveyance facility.

- 4.1. ~~The Governance Workgroup expects that United States owns, and USBR and DWR will not have co-equal responsibilities for water operations.~~
- 4.2. Under existing authority, USBR owns Central Valley Project's (CVP) operates, the CVP's existing Delta facilities, including the Jones Pumping Plant. The Governance Workgroup expects that it will USBR is expected to seek to and obtain take and other regulatory authorizations consistent with the plan to continue to operate such facilities in accordance with applicable environmental laws. The plan will recognize that USBR's authorization under ESA section 7(a)(2), and DWR's authorization under ESA section 10(a)(1)(B), will have different scopes and assurances.
5. Mirant will be ~~a permittee~~an authorized entity for the purpose of its power operations.

Implementing and Supporting Entities

6. Each ~~permittee-authorized entity~~ will be designated as an implementing entity responsible to implement ~~covered activities and the plan's conservation measures under NCCPA section 2835, ESA section 7(a)(2), ESA section 10(a)(1)(B), or other permitting authorities.~~strategy consistent with its regulatory authorizations.
- 6.1. The plan, and implementing ~~agreement~~, or related ~~agreement (such as described in point 4.1)~~agreements will ~~assign~~designate specific responsibilities to each implementing entity. ~~The Governance Workgroup expects~~
- 6.1.1. An implementing agreement is that such agreement which runs between the regulatory agency and authorized entity under NCCPA section 2820(b), and as appropriate under ESA section 10(a)(1)(B), to describe responsibilities will not be co-equal for implementation.
- 6.1.2. Other agreements may run between the authorized entities, or between the authorized entities and supporting entities (as described in point 8), to describe such responsibilities. An example is the agreement described in point 4.1.
- 6.1.3. The plan or implementing or other agreement may assign a responsibility (which is the regulatory responsibility of one authorized entity) to another implementing entity for cost-effectiveness or other reasons.
- 6.2. Each implementing entity will have the legal and financial capacity to implement its assigned responsibilities.

- 6.3. ~~If non-permittees assist the implementing entities (as described in point 8), the permittees~~Each authorized entity will retain ~~regulatory responsibilities~~ultimate responsibility for implementation ~~of each measure which a regulatory authorization requires of it, even though the implementing or other agreement designates another implementing or supporting entity to implement that measure.~~
7. DWR and USBR will be designated as ~~an implementing entity~~entities for the purpose of water operations, ~~and among other things. Subject to continuing discussion as described in point 3.1, the Contractor~~JPA may be so designated. ~~As stated in point 6.1, such responsibilities will not be co-equal and instead will be~~Responsibilities of each implementing entity may vary, as specified in the plan, ~~and implementing agreement, or related agreement (such as described in point 4.1) other agreements.~~
- 7.1. DWR will be an implementing entity responsible for construction, operation, and maintenance of the new conveyance facility. It will continue to have responsibility for operation and maintenance of the Banks Pump Station and other State Water Project facilities.
- 7.2. The Contractor JPA may be ~~a permittee~~an authorized entity and implementing entity as described in point 3.2.
- 7.3. USBR will be an implementing entity responsible for operation and maintenance of the Central Valley Project facilities.
- ~~7.4. By April 2009, the Governance Workgroup will make a recommendation to the Steering Committee whether any other entity should be a permittee and implementing entity for water operations for conservation of fish and wildlife.~~
8. Entities other than ~~permittees~~authorized entities will assist implementing entities ~~for (hereafter, "supporting entities") in the implementation of the conservation measures such as habitat restoration and management of other stressors.~~strategy.
- 8.1. The plan, implementing ~~agreement~~or other agreements, or any combination will designate each such supporting entity and specify its tasks ~~for~~implementation.
- 8.2. ~~Each~~The relevant authorization of an authorized entity will cover each such supporting entity ~~will receive coverage~~ for take of listed species or other environmental impacts, ~~through the permittee's regulatory authorization.~~

- 8.3. ~~A permittee~~An authorized entity will oversee each ~~such~~supporting entity's performance of its responsibilities for plan implementation. The ~~permittee will have authority to~~authorized entity may terminate such ~~other~~ entity's responsibilities, if the ~~responsibility~~ (under the plan or any implementing or related agreement) for tasks which that ~~other~~ entity does not perform adequately.
- 8.4. Designation of a supporting entity will be a function of its jurisdiction, expertise, or other practical capacity to increase the likelihood of timely and successful plan implementation.
9. Supporting entities ~~for the purpose of habitat~~ may assist in implementation of the conservation strategy, as described in the plan, regulatory authorizations, and management of other stressors will implementing or related agreements. These entities may include, among others:
- 9.1. Delta Conservancy, if established by new state statute as proposed by Delta Vision, for the purpose of implementing certain conservation measures. The Delta Conservancy will be able to accept public funds directly or through another State or Federal agency for such implementation.
- 9.2. Other public agencies and private entities that have jurisdiction, capacity, and expertise to perform such measures in a cost-effective, reliable, and timely manner.
- 9.3. Regulatory agencies (USFWS, NMFS, and CDFG) which will participate with the appropriate implementing entities in real-time decision-making regarding operations of a covered facility or other covered activity to avoid or minimize take of covered species.

BDCP Implementation Council

10. An ~~implementation~~ Implementation Council will be formed for the purposes of (i) ~~consulting with the~~ coordination between implementing entities and other Council members on plan implementation and (ii) non-binding ~~dispute resolution procedures to resolve disputes~~ between members ~~regarding that relate to~~ the adequacy of such implementation-of the plan. Both functions will be advisory to the implementing entities.
- 10.1. The plan will specify eligibility criteria for membership. Such criteria will cover: (i) ~~permittees~~ authorized entities and any other implementing entities; (ii) ~~permitting~~ regulatory agencies (in ordinary or *ex officio* capacity, as they may specify); (iii) other members of the BDCP Steering Committee; (iv) Delta ~~Counties~~ counties and other local governments; and (v) other

stakeholders whose assistance will increase the likelihood of success in plan implementation.

- 10.2. The plan will specify procedures for these functions. These procedures will be designed and implemented to be efficient and specifically to permit the implementing entities to timely implement ~~permit obligations~~their responsibilities. These procedures may vary by plan element.
- 10.3. Such procedures will fully preserve the existing authorities of any member, including implementing entities and regulatory agencies, to act as required by such authorities. These entities will not delegate any such authorities to the Implementation Council.
- 10.4. Such procedures will comply with applicable requirements of open meeting laws.
11. The implementing entities will periodically ~~report to and otherwise~~consult/coordinate with ~~other council~~Council members on ~~(i)~~ past activities and ~~(ii)~~ upcoming plans for water supply operations, conservation measures, and adaptive management.
 - 11.1. Such ~~consultation~~coordination will permit the implementing entities and other members to exchange information, comments and recommendations.
 - 11.2. The purpose of such ~~consultation~~coordination is to maximize mutual understanding of plan implementation, document the outcome and basis for decisions in order to facilitate such understanding as well as adaptive management, and minimize risk of disputes. As stated in point 10.3, such coordination will complement and not substitute for the ordinary communication between the authorized entities and regulatory agencies in oversight of the authorizations.
12. The Council will use a non-binding ~~procedures~~procedure for dispute resolution related to adequacy of plan implementation, including the performance of adaptive management.
 - 12.1. Such ~~procedures~~procedure will be designed and implemented to minimize the risk and scope of litigation related to plan implementation, while fully reserving each ~~council~~Council member's legal rights.
 - ~~12.2. Dispute resolution procedure will apply proactively. Thus, if the plan provides that an operational decision will be made on a seasonal basis, the procedure will apply in advance of that season. If an operational decision will be made on a daily or other real-time basis, the procedure will concern~~

~~the implementing entity's approach to such decisions (e.g., how is it interpreting applicable criteria?), rather than any particular day's decision.~~

- 12.2. **Plan Implementation and Permit** ~~This procedure will generally be prospective, such as a periodic review of plan implementation to improve going-forward performance.~~

Plan Implementation and Regulatory Compliance

13. The implementing entities will implement the plan as required by ~~the~~ regulatory ~~authorizations and related permits.~~
14. The plan will ~~contain procedures for~~ describe routine and non-routine ~~adaptive management of its changes to the~~ conservation measures. ~~See The description of each measure, as stated in Chapter 4.6, Figure 3.X.1. These procedures, will specify include, as appropriate:~~ (i) triggers for such potential changes, (ii) substantive criteria which the implementing ~~entities~~ entity will apply, ~~and (iii) permitting a range of permissible change, and (iv) responsibilities for coordinating with, or obtaining concurrence from, regulatory agencies and other entities with whom the implementing entities will consult before implementation of the change.~~
- 14.1. ~~The plan will contain flow measures for conservation~~ As described in Chapter 3.6.1, where successful implementation of listed fish and wildlife. The Governance Workgroup expects that some such measures will be a measure requires responsiveness to variable circumstances, the plan and regulatory authorizations may provide for routine changes. An example is a water operations rule which changes by water year-type, season, or a month, or other real-time basis. variables.
- 14.2. The plan will ~~specify effective procedures provide~~ for such variable flows, including (i) triggers, (ii) substantive criteria, and (iii) obligations for consultation or approval non-routine change when routine change will not effectively achieve the stated objective. A non-routine change may require greater level of coordination with the regulatory agencies before implementation.
- 14.3. The plan may provide that some measures will be fixed.
- 14.4. For those measures authorized to be changed, the plan will describe a starting boundary between routine and non-routine changes. As described in plan Chapter 3.6, in the early years of implementation, the implementing entities and regulatory agencies will develop a better understanding of the circumstances that justify greater coordination. They may adjust that boundary on the basis of their experience.

- 14.5. Such routine and non-routine changes will be substantially informed by the scientific approach to adaptive management – consisting of new research as well as analysis of monitoring results (Chapter 3.7) to test hypotheses about the mechanisms, effects, and effectiveness of measures (Chapter 3.6).
- 14.6. Any change beyond the routine and non-routine changes described in the plan and regulatory authorizations will require a plan modification, as described in Chapter 6.3 – 6.4. The plan will explain how these procedures comply with regulatory requirements for responses to changed and unforeseen circumstances.
15. Compliance with the plan will be enforceable and enforced under the ~~permitting~~regulatory statutes listed in points 1.1 ~~–and~~ 1.2, as applicable.
- 15.1. The plan will be a condition of each ~~permit~~regulatory authorization issued for covered activities.
- ~~14.2. Water rights for water operations The plan will be subject to enforcement under~~describe how it will be enforceable under each applicable regulatory authorization. For example, water operations (whether by federal or non-federal entity) will continue to be subject to applicable provisions of the California Water Code, with respect to water rights and water quality impacts. This statute applies to all permittees regardless of legal status as a federal or non-federal entity. Other. The plan will reflect the view that existing statutes, such as the ESA, will apply differently to permittees, depending on federal status.
- 15.2. ~~It is our preliminary view as listed in points 1.1 – 1.2, provide sufficient authority to assure adequate plan implementation as a condition of the authorizations issued under those statutes; and that use of the Coastal Zone Management Act (CZMA), as recommended by the Delta Vision Task Force, is not necessary to assure adequacy or consistency of plan implementation by federal and non-federal permittees. The Governance Workgroup does not express a view about the use of the CZMA for regional governance such implementation.~~
- ~~14.2.2. It is our preliminary view that existing statutes, as listed in points 1.1 – 1.2, provide sufficient~~Each regulatory authority to assure plan implementation as a condition of permits issued under those statutes.
- 15.3. ~~The Governance Workgroup recommends that each permit~~authorization necessary for plan implementation should recognize that ~~the~~certain covered activities, including water operations, are governed by other

~~permits~~authorizations and requirements, such as the water quality standards in the *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*. To the extent feasible, each ~~permits~~such authorization should provide for integrated approach to compliance with the several ~~permits~~authorizations, such as routine coordination between the ~~permitting~~regulatory agencies regarding the status of plan implementation, while recognizing that each ~~permitting~~regulatory agency has independent ~~statutory~~ authority.

15.4. Major plan modification will require amendment of all applicable ~~permits~~regulatory authorizations.

16. By April 30, 2009, the Governance Workgroup will make a recommendation to the Steering Committee ~~whether contracts, water or property rights, or other non-~~permit~~on~~ mechanisms that should be used to govern real-time operations to enhance species recovery and water supply reliability beyond what otherwise will be accomplished by ~~permits.~~regulatory authorizations.

Coordinated Governance

17. The plan will contain appropriate provisions so that ~~-~~governance of plan implementation is compatible with ~~-~~ the overall governance of Delta natural resources that may be established pursuant to the recommendations of Delta Vision Task Force or otherwise.

17.1. Each ~~permit~~regulatory authorization under the statutes listed in points 1.1 – 1.2 will be enforced by the ~~permitting~~regulatory agency.

17.2. Coordination between any new regional government and the ~~permitting~~regulatory agencies will ~~thus concern matters outside of~~ permit~~not be necessary to assure~~ with such authorizations.

18. By separate agreement concurrent with plan adoption, the ~~permittees~~authorized entities and other stakeholders ~~may agree~~expect to establish provisions to ~~help~~ advance coordinated regulation of all ~~-~~facilities and activities that affect achievement of plan goals or performance of plan responsibilities in the Delta watershed.